

*a***GUTHRIE MALAYSIA TRADING CORP. SDN. BHD.****v.****SOILGEN (SABAH) SDN. BHD.**

HIGH COURT BORNEO, KOTA KINABALU

SYED AHMAD IDID JC

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[ORIGINATING SUMMONS NO. K 103 OF 1990]

18 JULY 1991

CONTRACT: *Sole distributorship - Goods sent back for repacking - Whether owned by principal or distributor - Evidence Act 1950, s. 114(f).*

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The plaintiff sought a declaration that the goods held by the defendant belonged to the plaintiff. The plaintiff also asked for an injunction restraining the defendant, its servants or agents, from selling or otherwise disposing of the goods. The plaintiff also asked for an order for specific delivery of the goods, and damages for conversion and detinue. An interim injunction was granted. The defendant applied to set aside the injunction.

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The plaintiff claimed that the goods had been sent back to the defendant for “repacking and reformulation purposes” but the defendant contended that the goods had been sold back to the defendant pursuant to an oral agreement.

Held:*e*

[1] The evidence of the plaintiff’s general manager is sufficient to establish the identity of the goods and that the goods had been sent back to the defendants. Such despatch from plaintiff and receipt by defendant clearly evidenced the identity of the goods.

[2] This is supported by the terms of the sole distributorship agreement between the defendant (as principal) and the plaintiff (as sole distributor) which indicate that the goods belonged to the plaintiff.

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[3] The goods did not become the property of the debenture holders as the deed of debenture affects only the defendant’s own properties. The goods were sent back to the defendant more than a month before the appointment of the receiver and manager.

[Plaintiffs’ application granted.]

Legislation referred to:

Evidence Act 1950, s. 114illus.(f)

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For the plaintiff - P.K. Lim; M/s. P.K. Lim & Co., Kota Kinabalu

For the defendant - Norbert Yapp; M/s. Jayasuriya Kah & Co., Kota Kinabalu

JUDGMENT**Syed Ahmad Idid JC:***h*

1. During the Court vacation on 17 November 1990, the plaintiff filed an originating summons (together with a certificate of urgency) and prayed for:

(a) declarations that the plaintiff was the lawful owner of the goods (enumerated) and that the defendant was unlawfully holding the same;

(b) an injunction restraining the defendant, its servants or agents from transferring, selling or otherwise disposing of the goods;

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- (c) an order for specific delivery of the goods and that the defendant account to the plaintiff for any shortfall;

(d) damages for conversion and detainue;

(e) costs of this action; and

(f) such other relief.

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- 2. The application for an interim injunction was heard on 21 November 1990 whereupon an injunction was granted. Another certificate of urgency was filed by Mr. Lim Pitt Kong on 25 March 1991 asking for the early disposal of this matter as the goods “have a limited shelf-life and improper storage conditions could result in the goods being unmarketable.” A letter from the instructing solicitors, M/s. Zainal Abidin & Co., of Kuala Lumpur was attached in support. An early date for the hearing was set for 17 June 1991 but this was changed to 2 July 1991 for open Court arguments.

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- 3. There were two applications (i) the originating summons, and

(ii) Summons-in-chambers filed by the defendant to set aside the *ex parte* injunction. The hearing on 2 July 1991 was on the main action. Counsel relied on the affidavits by Shariff Mohd. Shah dated 14 November 1990, 11 June 1991 and 13 June 1991 and that by Chin Chee Thau dated 15 June 1991; reference was also made to defendant’s affidavit by Gopalan G. Murugesu dated 12 June 1991.

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- 4. Gopalan G. Murugesu was appointed the receiver and manager of the defendant on 3 October 1990. He took possession of the defendant company premises including stock-in-trade, manufactured and semi-manufactured, shortly afterwards.

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- 5. While Gopalan stated that the “goods in question are not the plaintiff’s, because plaintiff had sold the goods back to the defendant pursuant to an oral agreement,” Shariff (the general manager of plaintiff), on the other hand, explained that:

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- (i) Plaintiff purchased certain detergent powder from defendant;

(ii) These powder, valued at RM215,430.60, was sent back to defendant “for repacking and reformulation purposes” on 30 August 1990. This was supported by documents at Exhibits SMS2 and SMS4;

(iii) When the receiver and manager wrote to plaintiff on 22 October 1990, plaintiff’s solicitors responded quickly on 24 October 1990 to claim “the RM215,430.60 worth of damaged stock now in your possession.”

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- 6.(i) The Court finds that such evidence is sufficient to establish the goods in question and that such goods had been sent back to defendant. As between the parties, such despatch from plaintiff and receipt by defendant clearly evidenced the identity of the goods. On this, I reject defendant’s Counsel’s contention that the originating summons should be struck out.

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- (ii) Obviously the term “the goods” mean the goods consigned from plaintiff back to defendant. The defendant, who hold the stock, must know these goods. In fact the plaintiff’s branch manager went to defendant’s office to collect the goods but was told he could do so with a Court order. The goods had actually been identified in the affidavit of Shariff Mohd. Shah affirmed on 14 November 1990. The learned Counsel for the defendant told the Court that “all these items are still in defendant’s possession”

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- a* but sadly it was also said “and not capable of identification.” The invoice dated 28 August 1990 provided the description of the goods and their brands as well as weight/sizes. The total quantity shown was 66,761 boxes. So there should be no difficulty in arranging for these goods to be returned to plaintiff.
- b* 7. I was not able to follow the defendant’s Counsel’s arguments that “it was the intention of plaintiff to sell the goods back to the defendant”. One who reads the sole distributorship agreement between defendant (as principal) and plaintiff (as sole distributor) should know that “balance stock, if any, belongs to the sole distributor.” See cl. 3.04.2. This agreement is for a term of 36 months from 10 March 1988 to 9 March 1991.
- c* 8. I do understand that the receiver and manager must resist any attempt to take out goods as it was part of his duty to take possession of and get in the property of the company. He may, however, also carry on or manage the business of the company. The Court was made aware of Exhibit GM5 but as it was a new piece of paper, with some writing in ink and the entry of 9/30 (30 September?) and simply stating C/N (Credit Note?) 0146 of RM215,430.60 (observe the sum), this can be an afterthought. No proper itemization or serialization was done to enable me to admit it or the other Exhibit GM6 under
- d* s. 114(f) of the Evidence Act 1950:
114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
- Illustrations
- e* The Court may presume:
- (f) that the common course of business has been followed in particular cases;
- f* 9. One aspect which bothers me was the argument that the goods (which plaintiff had sent to defendant) had become the property of the debenture holders on 3 October 1990. I am not convinced on this contention. It should be fairly easy to see that Standard Chartered Bank’s All-monies Debenture dated 25 February 1986 only secured the defendant’s own properties including raw materials or finished products (by way of a first floating charge). So all other assets or goods belonging to others, for example, plaintiff’s, do not come within the responsibility of the receiver and manager. It must be noted that the goods in question had been sent to the defendant on 30 August 1990, more than a month before the receiver and manager’s appointment. The stock were itemized and duly received at the defendant’s premises. The defendant’s general manager (Chin Chee Thau) at time of the transaction confirmed this *vide* his affidavit dated 15 June 1991. Richard Bainon, once a marketing manager of the defendant, *vide* his letter dated 23 October 1990 confirmed that “these stocks will remain as GMTC’s (or plaintiff’s) property.”
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- h* 10. As for the plaintiff’s claims, even the former general manager of defendant had supported the affidavits of Shariff Mohd. Shah, the general manager of the plaintiff company, dated 14 November 1990 and 11 June 1991. Though Gopalan G. Murugasu, the receiver and manager of the defendant company, believed that letters in support of the plaintiff “were fabricated by defendant’s ex-employees”, no evidence to show such letters were false or forged had been adduced. All that defendant company’s receiver and manager did was to say that there was no merit in the plaintiff’s claim that the returned goods would
- i* remain the plaintiff’s property.

11. This Court, on the affidavit evidence before it, hereby grants the order-in-terms of the originating summons dated 17 November 1990. Order accordingly.

Also found at [1991] 3 CLJ 2158

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